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**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 74-16187 (Kurt W. &)
Janet E. Bird))
_____)**

**IWRB'S POST-HEARING
BRIEF**

The Idaho Water Resource Board ("IWRB"), by and through its counsel of record, hereby submits IWRB's post-hearing brief in the above-captioned matter.¹ Application for permit no. 74-16187 ("Application") proposes to divert 6.4 CFS for irrigation from Big Timber Creek, a tributary of the upper reach of the Lemhi River. Ex. IDWR 1. The Application should be denied as contrary to the local public interest, Idaho Code § 42-203A(5), for the reasons discussed below.

¹ The hearing was held on August 28-29, 2019, in Salmon, Idaho. At the conclusion of the hearing, the Hearing Officer gave the parties permission to submit post-hearing briefs, to be filed no later than September 27, 2019.

INTRODUCTION

The IWRB is the “Water Resource Agency” established by the Idaho Constitution, and among its other powers and duties is authorized to “formulate and implement a state water plan for optimum development of water resources in the public interest.” Id. Const. Art. XV § 7; Idaho Code §§ 42-1732—42-1734B. IWRB filed a protest to the Application stating, in part, that “the application is not in the local public interest because it may negatively affect efforts to recover Endangered Species Act (ESA) listed fish species in the Lemhi River Basin,” that “[i]t is in the local public interest to recover the species for natural resources, recreational, and economic interests to maintain the viability of the agricultural communities,” and “[a]dditional withdrawal from the flow limited area is counter-productive to that goal and threatens efforts to move in a voluntary manner towards recovery.” Ex. IDWR 3, Attachment A (parentheses in original; brackets added).

In the *Order Granting Joint Motion for Partial Summary Judgment, in Part (“Summary Judgment Order”)*, the Hearing Officer held that it is in the “local public interest” to:

- maintain the anadromous fisheries in Big Timber Creek and in the Lemhi River Drainage;
- to reconnect Big Timber Creek to the Lemhi River and to recover fish species listed under the ESA because those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA; and
- to maintain a portion of the unappropriated water in streams supporting anadromous fish for the protection of fish habitat.

Evidence on these and other local public interest factors was presented at the hearing. The central question now before the Hearing Officer is whether the Application should be denied, or approved with the 13 CFS “bypass” conditions proposed by the Applicant.

ARGUMENT

1. SUMMARY OF ARGUMENT

This Application should be denied as contrary to the local public interest. IDWR must “balance” all of the local public interest factors, but “balancing” does not mean giving equal weight to all conceivable elements of the local public interest. *See Shokal v. Dunn*, 109 Idaho 330, 339, 707 P.2d 441, 450 (1985) (“Nor will the elements have equal weight in every situation. The relevant elements and their relative weights will vary with local needs, circumstances, and interests.”). Further, when the “relative weights” of the “relevant elements” of the local public interest elements tip the scale decisively against an application, “balancing” means the application should be denied rather than approved with conditions. *See Idaho Code § 42-203A(5)* (authorizing IDWR to “reject” and refuse issuance” of applications that are contrary to the local public interest). In this case, the significant and undisputed local public interest in fish conservation and recovery efforts in the Lemhi River Basin far outweighs any local public interest in approving the Application.

Further, the uncontroverted evidence in this case establishes that the 13 CFS “bypass” conditions do not protect the important local public interest in fish conservation and recovery efforts in the Lemhi River Basin. At most, these conditions protect only the migration of adult fish from the Lemhi River into the lower reaches of Big Timber Creek. These conditions would not prevent further depletion of the already critically

impaired instream flows of Big Timber Creek and the Lemhi River, and any additional depletions of existing instream flows in the Lemhi River Basin would adversely affect the critical habitat and populations of ESA-listed fish species that are already at “high risk.” Approving the Application with the 13 CFS “bypass” conditions would undermine years of extensive, expensive, and voluntary fish conservation and recovery efforts in the Lemhi River Basin, would increase the risk that NOAA Fisheries will directly enforce the ESA against Lemhi River Basin water users, and would erode the amount of “high flows” available for use in the Lemhi River Basin. Balancing these significant harms to acknowledged elements of the local public interest against the *de minimus* local public interest values asserted by the Applicant tips the scale decisively against approving the Application.

2. BACKGROUND AND CONTEXT.

The historical context, substance, and current status of fish conservation and recovery efforts in the Lemhi River Basin are important considerations in weighing the local public interest factors in this matter. These subjects are discussed in detail in *IDFG’s Post-Hearing Brief*, and summarized below.²

Populations of the listed fish species in the Lemhi River Basin are severely depressed, and remain at “high risk” of extirpation from the Lemhi River Basin. *IDFG’s Post-Hearing Brief* at 15. From a fish conservation and recovery perspective, the entire

² Much of the evidence and factual information discussed in this brief is set forth in detail, with citations to the record, in the post-hearing brief filed in this matter by the Idaho Department of Fish and Game (“*IDFG’s Post-Hearing Brief*”). Therefore, in order to avoid unnecessary duplication and to enhance readability, this brief often cites to *IDFG’s Post-Hearing Brief* without making additional citations to the record. The citations in this brief to IDFG’s brief are intended to include the record citations therein. The IWRB also incorporates *IDFG’s Post-Hearing Brief* into this brief by this reference.

Lemhi River Basin has been critically flow-limited for many years, and low instream flows remain a limiting factor in fish conservation and recovery efforts in the basin.

IDFG's Post-Hearing Brief at 3, 6, 16.

Recovery of the listed fish species within the Lemhi River Basin is essential to recovery of the listed species within the State of Idaho. *IDFG Post-Hearing Brief* at 9. The Lemhi River Basin has been the main focus of fish conservation and recovery efforts in the Upper Salmon River Basin for many years, including grassroots efforts developed by local water users and landowners. *Id.* at 4-15; Ex. 219 at 32-42, 57-62.

A top priority of fish conservation and recovery efforts in the Lemhi River Basin has been to preserve existing instream flows, and enhance them whenever possible. *IDFG Post-Hearing Brief* at 10-14; Ex. 210 at 12-15 (excerpts of Idaho State Water Plan, pages 71-74). Instream flows are essential to fish conservation and recovery efforts in the Lemhi River Basin for several reasons. Instream flows are necessary to support life activities and strategies of the listed species, such as passage, migration, spawning, rearing, growth, and survival. *IDFG Post-Hearing Brief* at 11. Instream flows are also necessary to maintain and improve fish habitat in the Lemhi River and its tributaries. *IDFG Post-Hearing Brief* at 12.

The amount of instream flow necessary for these purposes varies, depending on factors such as life stage, life activity, location, channel characteristics, and time of year. *IDFG Post-Hearing Brief* at 12-13. Variable instream flows that follow or mimic the natural hydrograph, including seasonal peak flow events, are essential to maintaining and restoring fish habitat in Big Timber Creek and the Lemhi River of the quality and

diversity necessary to support conservation and restoration of the listed species. *IDFG Post-Hearing Brief* at 13-14.

Instream flows in tributary streams such as Big Timber Creek are particularly important because the tributary streams historically contained high quality fish habitat necessary for spawning, rearing, survival, and migration. *IDFG Post-Hearing Brief* at 14. Providing access to this tributary habitat through “reconnect” projects, and recovering degraded habitat within the tributaries, is essential to fish conservation and recovery efforts in the Lemhi River Basin generally, and in Big Timber Creek in particular. *Id.*

Maintaining and enhancing instream flows in the tributary streams is also crucial to maintaining and enhancing fish habitat in the mainstem of the Lemhi River itself, especially the Hayden Creek to Leadore reach. *IDFG Post-Hearing Brief* at 14-15. This reach is the Lemhi River’s primary Chinook Salmon spawning and production area, and is critical to fish conservation and recovery efforts in the Lemhi River Basin. *Id.* Tributary inflows to this important reach are essential for maintaining and improving habitat quality, diversity, and complexity in the Lemhi River. *Id.*

For all these reasons, maintaining and enhancing instream flows in the Lemhi River Basin is also critical to protecting local water users from ESA enforcement actions by NOAA Fisheries.³ In the year 2000, NOAA Fisheries threatened Lemhi River Basin water users with penalties and injunctions as a result of dewatering at L-6 that killed

³ “NOAA” is the National Oceanic and Atmospheric Administration, which is part of the U.S. Department of Commerce. The term “NOAA Fisheries” refers to the National Marine Fisheries Service, an agency within NOAA.

several salmon. *IDFG Post-Hearing Brief* at 4; Exs. 206A—206B; *see also* Ex. 219 at 35 (“The Crisis”). Since then, voluntary and cooperative fish conservation and recovery actions taken by the IWRB, IDFG, and a number of local water user and stakeholder groups have been instrumental in protecting Lemhi River Basin water users from enforcement actions by NOAA Fisheries. *IDFG Post-Hearing Brief* at 4-9, 21; Ex. 219 at 35-42. Particularly important to protecting local water users from NOAA Fisheries enforcement actions has been the concerted, long-standing effort to prevent further depletions of the already impaired instream flows of the Lemhi River Basin, and to enhance or improve instream flows when possible. *Id.*

The IWRB has been deeply involved in fish conservation and recovery efforts in the Lemhi River Basin for many years. The IWRB’s principal role in these efforts has been to help maintain and enhance existing instream flows. Ex. 219 at 41. In 2001 the Legislature directed the IWRB to appropriate a minimum streamflow water right on the lower Lemhi River,⁴ Idaho Code § 42-1506, to provide flows “for the passage of anadromous fish.” Ex. IDWR 15.⁵

In 2003, the IWRB established the Idaho Water Transactions Program, Ex. 213, which “compensates water right owners for changes in irrigation practices that protect the local economy while providing the flows required for recovery of ESA-listed species in accordance with Idaho water law.” Ex. 219 at 3; *see also* Ex. 212 at 2 (“support[ing]

⁴ Downstream of the L-6 diversion, at the location of the former L-5 diversion. Maintaining this minimum streamflow was one of the requirements of the 2004 Snake River Water Rights Agreement. Ex. 190 at 3.

⁵ The Legislature also directed the IWRB to appoint a local rental committee in the Lemhi River Basin to administer a water supply bank, which was intended to help support the IWRB’s minimum streamflow water right. Idaho Code § 42-1765A.

innovative, voluntary, grassroots water transactions that improve flows to tributary streams and rivers in the Upper Salmon River Basin”). The Idaho Water Transactions Program “targets flow-related projects that reconnect tributaries and increase flow in the mainstem Lemhi and Pahsimeroi rivers to improve fish passage conditions and increase the quantity and quality of fish habitat.” Ex. at 210 at 15 (“page 74” of excerpts of Idaho State Water Plan).

The Idaho Water Transaction Program secures the instream flows necessary to maintain the minimum streamflow at L-6, and provides essential support to efforts to “reconnect” tributaries to the Lemhi River that historically have been fully or partially dewatered in their lower reaches during the irrigation season. Ex. 219 at 17, 41; Ex. 212; Ex. 215. The Idaho Water Transactions Program also pays for an extensive network of stream gages throughout the Upper Salmon River Basin, including the Lemhi River Basin, in order to monitor and administer its water transactions. HD2F7 at 7:39 – 9:00⁶; Exs. 234-235.

The IWRB is also charged with formulating and implementing the Idaho State Water Plan, the “comprehensive state water plan for conservation, development, management, and optimum use of all unappropriated water resources and waterways of this state in the public interest.” Idaho Code § 42-1734A(1); *see also* Id. Const. Art. XV § 7 (“a state water plan for optimum development of water resources in the public interest”). Policy 6A of the State Water Plan provides that voluntary, community-based conservation plans and strategies for the benefit of ESA-listed species “are key

⁶ This is a citation the seventh audio file for the second day of the hearing, at 7 minutes and 39 seconds into the file. All citations to the audio files of the hearing will use this format.

components of water planning and management in the Salmon and Clearwater Basins.” Ex. 210 at 12 (“page 71”). Policy 6B provides that the IWRB will promote, provide, and expand opportunities for voluntary, market-based transactions “to improve instream flow for the benefit of ESA-listed aquatic species,” Ex. 210 at 13 (“page 72&”), and recognizes that “[t]he Board’s instream flow programs are central to the development and implementation of Section 6 Conservation Plans.” *Id.* at 14 (“page 73”). The “Implementation Strategies” and “Milestones” for Policy 6B focus on “improv[ing] instream flow.” *Id.* at 15 (“page 74”).

3. IDWR IS AUTHORIZED TO DENY APPLICATIONS THAT ARE NOT IN THE LOCAL PUBLIC INTEREST.

Idaho Code § 42-203A provides IDWR with the authority to “reject” and “refuse issuance” of a permit application when the proposed use “conflicts with the local public interest” as defined in Idaho Code § 42-202B. Idaho Code § 42-203A(5).⁷ This provision places upon IDWR “the affirmative *duty* to assess and protect the public interest.” *Shokal v. Dunn*, 109 Idaho 330, 337, 707 P.2d 441, 448 (1985) (*italics in original*).

The term “local public interest” should be read “broadly so as to secure the greatest possible benefit.” *Chisholm v. IDWR*, 142 Idaho 159, 164, 125 P.3d 515, 520 (2005). “Factors of the local public interest carry different weight depending on the specific circumstances and interests involved, and both the benefits and detriments must

⁷ The “local public interest” is defined as “the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resources.” Idaho Code § 42-202B(3).

be considered.” *Id.* IDWR’s “local public interest” determinations are reviewed under an abuse of discretion standard. *Id.*; *Shokal v. Dunn*, 109 Idaho at 339, 707 P.2d at 450.

4. THE APPLICATION SHOULD BE DENIED AS CONTRARY TO THE LOCAL PUBLIC INTEREST IN FISH CONSERVATION AND RECOVERY EFFORTS IN THE LEMHI RIVER BASIN.

a. Approving the Application Would be Contrary to the Local Public Interest in Maintaining and Recovering ESA-Listed Fish Species in the Lemhi River Basin.

The *Summary Judgment Order* established that it is in the local public interest “to maintain” the anadromous fisheries in Big Timber Creek and the Lemhi River, and “to recover” the ESA-listed fish species. *Summary Judgment Order* at 5. “Maintaining” the existing anadromous fish populations in Big Timber Creek and the Lemhi River requires, at a minimum, that there be no further depletion of their existing instream flows. “Recovering” the listed fish species requires even more: substantial increases in existing instream flows. The uncontroverted evidence allows for no other conclusions. *IDFG Post-Hearing Brief* at 3-25.⁸ It is therefore in the local public interest to at least preserve, and preferably to enhance, the existing instream flows of Big Timber Creek and the Lemhi River.

It follows that it is not in the local public interest to issue new irrigation water rights that would further deplete the already severely-impaired instream flows of Big Timber Creek and the Lemhi River. To do so would have adverse effects on the critical habitat and populations of the listed fish species, *IDFG Post-Hearing Brief* at 19-21, which are already at “high risk” of extirpation from the Lemhi River Basin. *Id.* at 3, 16,

⁸ See *supra* n.2 (incorporating *IDFG’s Post-Hearing Brief* into this brief).

19, 21. It also would be contrary to and undermine many years of efforts by IWRB, IDFG, and local people to preserve and enhance the instream flows necessary to maintain and recover the listed fish species through voluntary projects that also protect local water users and agriculture. HD2F7 at 12:20 – 12:58, 14:55 – 16:12; Exs. 210, 212-213, 215, 219-225, 235-236; *see also IDFG Post-Hearing Brief Id.* at 9-15.

All of this is true of the Application at issue in this case. Approving the Application would further deplete the already-impaired instream flows of Big Timber Creek and the Lemhi River, would adversely affect the critical habitat and depressed populations of fish species in the Lemhi River Basin that remain at “high risk” of extirpation from the basin, and would undermine fish conservation and recovery efforts in the Lemhi River Basin. *IDFG’s Post-Hearing Brief* at 18-24; Ex. 201 at 8-10, 16; Ex. 205; *see also* HD2F5 at 4:20 – 5:21 (agreeing that the NOAA Fisheries letter supports IDFG’s report).

b. Approving the Application Would be Contrary to the Local Public Interest in Protecting Existing Water Uses in the Lemhi River Basin from Federal Enforcement of the ESA.

The *Summary Judgment Order* established that fish conservation and recovery efforts in the Lemhi River Basin are in the local public interest because “those efforts contribute to the development of a cooperative conservation agreement intended to promote conservation of listed species and to provide local people with protection from incidental take liability under the ESA.” *Summary Judgment Order* at 5. The uncontroverted evidence offered at hearing conclusively confirmed this ruling, and also that issuing new irrigation water rights in the Lemhi River Basin “definitely hurts” efforts to obtain such a long-term cooperative conservation agreement.” HD2F5 at 4:05 – 4:20.

The uncontroverted evidence also established that even in the absence of a formal conservation agreement, fish conservation and recovery efforts in the Lemhi River Basin protect local water users from incidental “take” liability and ESA enforcement actions. *IDFG Post-Hearing Brief* at 8-9; *see also* Ex. 219 at 3 (referring to IWRB’s support of “changes in irrigation practices that protect the local economy while providing the flows required for recovery of ESA-listed species”) (underlining added); *id.* at 42 (stating that the “goal” of Lemhi habitat restoration efforts is to “[c]onserve, restore, and enhance sufficient habitat to sustain viable fish populations while protecting private property rights and preserving and enhancing the farming and ranching lifestyle and economy of the Lemhi River Basin.”) (underlining added); *IDFG Post-Hearing Brief* at 8-9. In short, fish conservation and recovery efforts in the Lemhi River Basin are in the local public interest because these efforts directly “provide local people with protection from incidental take liability under the ESA.” *Summary Judgment Order* at 5.

But the uncontroverted evidence also established that this protection from federal ESA enforcement actions could easily disappear if NOAA Fisheries concludes that approving new irrigation water rights in the Lemhi River Basin is undermining voluntary fish conservation and recovery efforts. *IDFG Post-Hearing Brief* at 8-9, 15-21; Ex. 205; HD2F3 at 35:06 – 37:00; HD2F4 at 59:45 – 1:00:42. This is a real concern for many Lemhi River Basin water users. HD2F8 at 17:50 – 19:00, 1:10:45 -1:12:50; HD2F11 at 15:30 – 16:30.

The fact that there may be unappropriated water in the Lemhi River Basin is irrelevant from a fish conservation and recovery perspective. HD2F3 at 34:35 – 35:05; HD2F4 at 2:43 – 2:58. Even in 2000, when NOAA Fisheries threatened to seek

penalties and injunctions against Lemhi River Basin water users for violations of the ESA, there was unappropriated “high flow” water in the Lemhi River Basin.⁹ But that did not mean that approving new irrigation water rights or increasing irrigated acres in the Lemhi River Basin was considered to be a wise or realistic option. *See, e.g.*, Ex. 196 at 16 (“Lemhi Framework” at 5) (“The State will work to prevent future depletion of the flow regime in [the Hayden Creek to Leadore] reach”); *id.* at 30 (“Habitat Actions Table” at 3) (“Work with water users to prevent the development of future water rights that further deplete mainstem flow.”); Ex. 198 at 32 (“There are minimal opportunities for the appropriation of additional water in the Lemhi Basin and therefore it is expected that these higher flows will be maintained.”).

To the contrary, simply protecting existing water uses in the Lemhi River Basin from NOAA enforcement has always been the challenge, and this is a major purpose and benefit of fish conservation and recovery efforts in the basin. Since 2000, enormous amounts of effort and millions of dollars have been dedicated to fish conservation and recovery projects in the Lemhi River Basin. Ex. 220 at 5-6; Ex. IDWR 12 at Attachment A. By protecting and recovering the listed fish species and their habitat in the Lemhi River Basin, these efforts and expenditures have benefitted all water users in the basin—including the Applicant, and including any water users or landowners who do not participate in or oppose the fish conservation and recovery efforts—by providing existing water uses with protection from NOAA enforcement actions.

⁹ “High flow” water is “unappropriated” water. Ex. 189 at 25.

The success of efforts to protect existing water uses from NOAA enforcement has perhaps led to the erroneous perception that “The Crisis”¹⁰ has been resolved, and there is now sufficient water in the Lemhi River Basin to approve new irrigation water rights or increase irrigated acres. *See, e.g.*, HD1F4 at 1:18:15 – 1:19:05 (“I thought they [the ESA issues] were addressed”). After all, the Lemhi River is no longer regularly dewatered at L-6, and a number of tributary reconnect and habitat improvement projects are in place. But the efforts and expenditures that brought about these results are intended to protect existing irrigation uses in the Lemhi River Basin from the still-present threat of NOAA Fisheries enforcement, not to underwrite irrigation expansion in the Lemhi River Basin. Even the Applicant readily agreed that protecting existing water rights is more important than approving new water rights, “without a doubt.” HD1F4 at 1:19:50 – 1:20:05; *see also* HD2F8 at 19:55 – 20:25; HD2F11 at 00:00 – 7:00 (water users testimony that protecting existing uses is more important than issuing new water rights). And the uncontroverted evidence established that from a fish conservation and recovery perspective, there is no water available in the Lemhi River Basin for irrigating new ground.

NOAA Fisheries has so far elected not to exercise its ESA enforcement authority against Lemhi River Basin water users largely because voluntary fish conservation and recovery efforts have prevented further depletions of the already-impaired instream flows of the Lemhi River Basin. HD2F2 at 10:35 – 10:55, 23:30 – 25:15, 38:48 – 39:00. Approving new irrigation water rights that further deplete the instream flows of the Lemhi River Basin would undermine the foundation for NOAA Fisheries’ continued

¹⁰ Ex. 219 at 35.

regulatory forbearance in the Lemhi River Basin, and risks inviting ESA enforcement actions that would be destabilizing and potentially devastating to the local economy of the Lemhi River Basin. HD2F3 at 35:06 – 37:00; HD2F4 at 59:45 – 1:00:42; HD2F8 at 18:40 – 19:08; HD2F11 at 00:00 – 7:00, 15:30 – 16:30, 17:40 – 17: 55; Ex. 205; *IDFG Post-Hearing Brief* at 9, 21.

c. Approving the Application Would be Contrary to the Local Public Interest in Maintaining a Portion of the Unappropriated Water in Big Timber Creek and the Lemhi River Basin for the Protection of Fish Habitat.

The *Summary Judgment Order* ruled that it is in the local public interest to maintain a “portion” of the unappropriated water in Big Timber Creek and the Lemhi River “for the protection of fish habitat.” *Summary Judgment Order* at 5. The question posed by the Application is what “portion” of the “unappropriated water” should remain available for new irrigation water rights?

The clear answer is it is in the local public interest that none of the remaining unappropriated water in the Lemhi River Basin should be considered available for new irrigation water rights.¹¹ This conclusion follows, in part, from the uncontroverted evidence and the preceding discussion of the local public interest in the voluntary fish conservation and recovery efforts in the Lemhi River Basin. Approving new irrigation water rights or increasing irrigated acreage in the Lemhi River Basin would further

¹¹ “Unappropriated water” in the Lemhi River Basin includes the “High Flow” water referenced in the General Provisions for Basin 74, as the SRBA District Court has explained. *See* Ex. 189 at 25 (“Since the use of high flow water does not create a water right high flows are therefore unappropriated water.”). The IWRB supports continued diversion and use of “High Flow” water in the Lemhi River Basin consistent with the SRBA District Court’s explication of the “High Flow” General Provision. *See, e.g.*, Ex. 189 at 28 (“The authorized use of high flow water is part of the efficient administration of the ‘base’ water rights in the Lemhi Basin.”).

deplete the basin's instream flows, which from a fish conservation and recovery standpoint are already critically low.

In any other basin, this might not be reason enough to consider all remaining unappropriated water to be unavailable for new irrigation uses. But the Lemhi River Basin is uniquely important to fish conservation and recovery efforts. Recovery of the listed fish species within the Lemhi River Basin is essential to recovery of the listed species within the State of Idaho. *IDFG Post-Hearing Brief* at 9; *see also* HD2F1 at 26:00 (“The Lemhi is obviously a key priority tributary”); *id.* at 44:05 – 44:20 (“The Lemhi Basin . . . is classified as a very large producer of Chinook Salmon in the Upper Salmon Basin, it was thought to be the largest producer of Chinook Salmon”); HD2F5 at 02:50 – 03:05 (agreeing that the Lemhi Basin is “the most critical” Upper Salmon sub-basin in terms of needing to improve habitat); Ex. 203 at 29 (“The Lemhi and Pahsimeroi River Chinook salmon populations . . . are critical to salmon recovery.”).

Further, the vast majority of the water supply in Big Timber Creek and the Lemhi River Basin has already been appropriated for irrigation purposes. The relatively small amount of unappropriated water that could be used for irrigation purposes is available for only a few weeks in late spring and early summer, and does not exist at all in some years. *See, e.g.*, HD1F2 at 6:30 – 6:40, 11:05 – 11:15. But as previously discussed, this water is critical to fish conservation and recovery efforts.

Under these circumstances, approving new irrigation water rights that would further deplete instream flows in the Lemhi River Basin that are already impaired is not “balancing” the local public interest. Rather, it amounts to impermissibly disregarding the local public interest in fish and recovery efforts in the Lemhi River Basin. *See Shokal*

v. *Dunn*, 109 Idaho at 337, 707 P.2d at 448 (“Indeed, I.C. § 42–203A places upon the Director the affirmative *duty* to assess and protect the public interest.”) (italics in original). Under the circumstances prevailing in the Lemhi River Basin, the weight of the relevant local public interest factors requires denial of the Application. *See id.* at 339, 707 P.2d at 450 (“The relevant [local public interest] elements and their relative weights will vary with local needs, circumstances, and interests.”).

The Lemhi River Basin’s unique General Provision for the use of “high flow” also supports the conclusion that none of the remaining unappropriated water in the Lemhi River Basin should be considered available for new irrigation water rights. The Lemhi River Basin is the only basin adjudicated in the SRBA that was decreed with a basin-wide “high flow” general provision, even though IDWR recommended such provisions for a number of river basins. *See generally* Ex. 189 at 10-24 (SRBA decision comparing and contrasting the “high flow” general provision for the Lemhi River Basin with “high flow” provisions recommended in other basins). The SRBA District Court has explained that the Lemhi Basin General Provision authorizes the diversion and use of “unappropriated” water. *Id.* at 28. In the Lemhi River Basin, the “high flows” may be “unappropriated” water, but they are also necessary to “the efficient administration of the ‘base’ water rights in the Lemhi Basin.” *Id.*

The testimony of Lemhi River Basin water users at the hearing established that it is in the local public interest to allow the continued diversion and use of “high flows” as authorized by the General Provision. HD2F8 at 17:30 – 17:50, 1:06:15 – 1:06:45; HD2F11 at 2:00 – 3:20. This testimony also established that it is in the local public interest to prevent diminution of the “high flows” available for existing water users that

would result from approving new irrigation water rights in the Lemhi River Basin.

HD2F8 at 13:05 – 14:00, 1:10:25 – 1:10:45. Approving the Application would reduce the “high flows” available to other local water users, however, as the Applicant admitted.

HD1F4 at 1:17:25 – 1:17:42. The IWRB supports the continued diversion and use of “high flows” in the Lemhi River Basin as authorized by the General Provision, and agrees that it is in the local public interest to prevent “erosion” of the “high flows.” *See* Ex. 219 at 98 (IWRB Staff Memorandum re: “Preserving General Provision High Flow Use in Lemhi River Basin”).

In sum, it is in the local public interest that none of the unappropriated water remaining in the Lemhi River Basin be considered available for new irrigation water rights. It is in the local public interest that this unappropriated water remain available to be diverted and used pursuant to the General Provision for “high flows” in the Lemhi River Basin. It is in the local public interest that any unappropriated water that is not diverted and used pursuant to the “high flow” General Provision should remain instream “for the protection of fish habitat.” *Summary Judgment Order* at 5.¹²

d. Approving the Application Would Reduce The Instream Flows of Big Timber Creek and the Lemhi River.

¹² Questions were raised at the hearing about future appropriations for uses other than irrigation, such as DCMI. This question is not before the Hearing Officer because “irrigation” is the only proposed use of water under the Application. Further, the threat of federal regulatory enforcement in the Lemhi River Basin was not triggered by DCMI uses but rather by irrigation diversions that dewatered the Lemhi River at L-6. Irrigation diversions remain the principal cause of low instream flows in the Lemhi River Basin. Applications for uses other than the irrigation of additional acres should be reviewed on a case-by-case basis. *See also* Ex. 190 at 2 (stating that “instream flows” established pursuant to the 2004 Snake River Water Rights Agreement “will be subordinated . . . to future rights for domestic, commercial, industrial, and municipal water rights.”).

As previously discussed, IDFG offered detailed technical evidence, through the testimony of Jeff DiLuccia, his report, and numerous exhibits, that the listed fish species remain at “high risk” in the Lemhi River Basin, that existing instream flows throughout the basin, including Big Timber Creek and the Lemhi River, are limiting recovery efforts. This evidence also established that any further depletions of the instream flows of Big Timber Creek and the Lemhi River would adversely affect the listed fish species and undermine conservation and recovery efforts.

The Applicant did not offer any contrary evidence, but rather asserted that he would divert less water from Big Timber Creek if the Application is approved, because he would be irrigating the place of use with sprinklers rather than flood irrigating it with “high flow” water. HD1F4: 1:13:50—1:14:35.¹³ The Applicant’s reliance on reduced “high flow” diversions is legally problematic because there are no existing water rights for all but 20 acres of the 320 acres within the proposed place of use. Ex. 183 at 17-18; HD1F2 at 1:35 – 2:15; HD1F4 at 12:10 – 13:10. The Water District 170 Watermaster and several Lemhi Basin water users testified that they understood the General Provision as authorizing the use of “high flows” only on lands for which there are existing water rights. HD1F6 at 34:00 – 1:11:20; HD2F8 at 7:15 – 7:30. This interpretation is confirmed by the SRBA District Court’s detailed analysis of the General Provision, the history and interpretation of which became a matter of dispute in the SRBA. *See generally* Ex. 189 (*Memorandum Decision and Order on Challenge, Subcase nos. 4-150151, et al. (294 “High Flow” Claims)* (Jan.3, 2012)). This decision held that the

¹³ The SRBA General Provisions for the Lemhi River Basin include a provision authorizing the diversion and use of “high flows.” Exhibit 188.

SRBA's "high flow" General Provision is based on and consistent with the "high flow" General Provision of the prior *Lemhi Decree*, and means no and more and no less than the "high flow" General Provision of the *Lemhi Decree*. *See id.* at 26 ("based on . . . the fact that the recommended general provision is consistent with a prior decree entered in a general adjudication . . . the Special Master did not err in recommending a general provision authorizing the use of high flow water . . . based on the *Lemhi Decree*.").

The SRBA District Court explained that in recommending the General Provision, the Special Master stated that the *Lemhi Decree* authorized "high flows as an 'ancillary use' of water – not a water right – tied to use on irrigated lands quantified in the *Lemhi Decree* (base rights)." ¹⁴ Ex. 189 at 8 (parenthetical in original) (underlining added). The SRBA District Court determined "the Special Master did not err in recommending a [SRBA] general provision authorizing the use of high flows water in conjunction with existing rights based on the *Lemhi Decree*," *id.* at 26 (underlining added), and held that "[t]he authorized use of high flow water is part of the efficient administration of the 'base' water rights in the Lemhi Basin." *Id.* at 28 (underlining added).

The Applicant's existing use of "high flows" on the proposed place of use is not authorized by the General Provision or an existing water right, and therefore is contrary to law. Idaho Code § 42-201(2). Thus, even if it is assumed, *arguendo*, that the Applicant will reduce the quantity of water diverted as "high flow" diversions by conversion to sprinklers on the proposed place of use after the Application is approved,

¹⁴ In the SRBA District Court's "High Flow" decision, the "*Lemhi Decree*" refers to the "Partial Decree Pursuant to Rule 54(b), I.R.C.P." and the "Stipulation Resolving General Objections" entered in the Lemhi Basin Adjudication (7th Jud. Dist., Civil Case No. 4948). Ex. 189 at 5-8. These two documents are included in the record as Exhibits 232—233.

the Applicant's total lawful diversions would still increase.¹⁵ The fact that currently unauthorized "high flow" diversions might be reduced or eliminated is not a relevant or lawful basis for approving the Application. Unauthorized diversions are a question of administration, not permitting. Idaho Code § 42-201(2); *see also* Ex. 189 at 28 ("The authorized use of high flow water is part of the efficient administration of the 'base' water rights in the Lemhi Basin."); *In re SRBA*, 157 Idaho 385, 393, 336 P.3d 792, 800 (2014) ("Idaho Code section 42-602 gives the Director broad powers to direct and control distribution of water from all natural water sources within water districts. . . . That statute gives the Director a 'clear legal duty' to distribute water. . . . However, 'the details of the performance of the duty are left to the director's discretion.'") (citations omitted).

Further, the Applicant should not be allowed to take a position that amounts to asserting that unauthorized diversions will be reduced so long as he is issued a new water right. *See* HD1F2 at 3:45 – 4:40 (testifying that "high flows" are used on the proposed place of use now, and that this "high flow" use on these lands will continue if the Application is not approved); HD1F4 at 41:10 – 41:25 (similar); *id.* at 46:55 – 46:20 (similar). Just as Rangen's longstanding but nonetheless unauthorized diversion and use of water from a spring was not allowed to support Rangen's protest in *North Snake Ground Water Dist. v. IDWR*, 160 Idaho 518, 524-26, 376P.3d 722, 728-30 (2016), the Applicant's existing but legally unauthorized use of "high flows" on the proposed place of use should not be allowed to support the Application in this case.

¹⁵ Somewhat confusingly, the Applicant also asserted that if the Application is approved his use of "high flow" water on the proposed place of use would not change. HD1F4 at 1:06:15 – 1:08:20. But if this is true, then the Applicant's total diversions from Big Timber Creek clearly would increase.

Moreover, the Applicant did not provide any hydrologic or diversion data or analysis substantiating or quantifying the asserted reduction in “high flow” diversions or depletions that would result from approving the Application. It is by no means obvious that approving the Application would reduce depletions of the instream flows of Big Timber Creek and the Lemhi River. *See* HD2F4 at 14:00 – 15:33 (“I’ve thought about this a lot, and I don’t know how [the Application] couldn’t affect those flows. . . . an additional 6 CFS . . . how would this not take water out and directly affect the quantity”). In light of the significance and undisputed importance to the local public interest of preventing further instream flow depletions, the Applicant’s unsupported and disputed assertion that approving the Application will not further deplete the instream flows of Big Timber Creek and the Lemhi River should carry little or no weight.

e. Approving the Application With the 13 CFS “Bypass” Conditions Would Not Protect the Local Public Interest in Fish Conservation and Recovery Efforts in the Lemhi River Basin.

The Applicant has asserted that approving the Application with conditions requiring a so-called 13 CFS “bypass” flow at the highway 28 gage will adequately protect the local public interest values recognized in the *Summary Judgment Order*. The basis for this assertion is the fact that the 13 CFS “bypass” conditions were applied to a previous application that raised very similar local public interest concerns, water right no. 74-15613. Ex. 186.¹⁶

The final permitting order for water right no. 74-15613 did not, however, determine that the 13 CFS “bypass” flows are sufficient to protect all of the local public interest values recognized in the *Summary Judgment Order*. To the contrary, the final

¹⁶ Water right no. 74-15613 was licensed with the same conditions in 2014. Ex. IDWR 16.

permitting order focused almost entirely on only one element of fish conservation and recovery efforts in the Lemhi River Basin—efforts to “reconnect” Big Timber Creek to Lemhi River for purposes of fish passage—and approved the 13 CFS “bypass” condition solely on grounds that this amount of flow is necessary “to allow migration of adult spring chinook salmon, steelhead, and fluvial bull trout into Big Timber Creek.” Ex. 186 at 6. There are no findings of fact or conclusions of law in the final permitting order for water right no. 74-15613 stating or implying that a 13 CFS “bypass” flow is sufficient for any fish conservation and recovery purpose other than allowing adult fish to swim upstream from the Lemhi River into Big Timber Creek.

The local public interest values recognized in the *Summary Judgment Order* are not limited to tributary “reconnects,” however, or to providing instream flow sufficient for adult fish to swim upstream from the Lemhi River into Big Timber Creek. The *Summary Judgment Order* states that it is in the local public interest to “maintain” and “recover” ESA-listed fish species in the Lemhi River Basin, and to protect fish habitat. *Id.* at 5. The *Summary Judgment Order* thus recognizes a much more expansive local public interest in fish conservation and recovery efforts than simply providing for upstream migration from the Lemhi River into Big Timber Creek.

In addition, the uncontroverted evidence in this case conclusively establishes that providing sufficient instream flow to allow adult fish to migrate upstream from the Lemhi River into Big Timber Creek is but one component of efforts in the Lemhi River Basin to “maintain” and “recover” the ESA-listed fish species, and to protect their habitat. *See, e.g., IDFG Post-Hearing Brief* at 9-15. The uncontroverted evidence also establishes that a 13 CFS “bypass” flow condition is nowhere near sufficient to “maintain” and “recover”

the ESA-listed fish species in Big Timber Creek, or to provide and protect fish habitat in Big Timber Creek of the quantity and quality necessary to meet recovery goals. *IDFG Post-Hearing Brief* at 21-26. Even the document IDWR relied upon for the 13 CFS “bypass” condition—the Bureau of Reclamation’s 2004 PHABSIM study—expressly recognizes that a 13 CFS instream flow is not sufficient to “maintain” and “recover” the listed fish species in Big Timber Creek, or to protect their habitat.¹⁷ *IDFG Post-Hearing Brief* at 22-23; *see also, e.g.*, Ex. 202 at 25 (“These results imply that the optimum amount of water needed for adult, spawning, and juvenile life stages is not constant, but varies during the year.”); *Id.* at 26 (“The natural hydrograph needs to be considered. . . . high spring flows that mimic the natural hydrograph should be a consideration in managing streamflows outside the PHABSIM analysis.”).

By focusing solely upon the instream flow necessary for upstream fish migration in the lower reaches of Big Timber Creek, the 13 CFS “bypass” condition also ignores the critical role that tributaries such as Big Timber Creek play in preserving and improving fish habitat conditions in the mainstem of the Lemhi River, especially the reach upstream from Hayden Creek. The uncontroverted evidence established that this reach is the Lemhi River Basin’s primary Chinook Salmon production area, and that inflows from tributaries such as Big Timber Creek are essential for maintaining and improving the quality, diversity, and complexity of the habitat in this reach. *IDFG Post-Hearing Brief* at 14-15. The 13 CFS condition fails to recognize that tributaries such as Big Timber Creek are the source of seasonal peak flows necessary for protecting fish

¹⁷ The PHABSIM study did not establish any standards or instream flows necessary for satisfying the ESA or recovering the listed fish species. The Bureau of Reclamation has no jurisdiction or authority to make such determinations. HD2F1 at 1:13:45 – 1:15:40.

habitat in the important reach of the Lemhi River upstream from Hayden Creek. *Id.*; also Ex. 201 at 10 (“high flow events originating from tributaries maintain and improved stream channel diversity and complexity”); Ex. 203 at 102 (“Irrigation diversions significantly reduce instream flows by diverting tributaries away from and out of the mainstem Lemhi River. The many irrigation diversions have nearly eliminated an important intermittent disturbance regime associated with the spring freshet and channel-forming flows.”).

f. Approving the Application With the 13 CFS “Bypass” Conditions Would Have the Effect of Impermissibly Establishing a Minimum Streamflow on Big Timber Creek.

The 13 CFS “bypass” conditions imposed on water right no. 74-15613 were challenged as effectively establishing a minimum streamflow in violation of Chapter 15, Title 42, Idaho Code. Ex 187 at 2. IDWR rejected this argument because the conditions were “specific to Whittakers’ proposed use of water,” and implied that the condition would play no role in future permit applications. *Id.*

That will not be the case if IDWR adopts the 13 CFS “bypass” conditions in this case on grounds that IDWR has already determined that the 13 CFS “bypass” conditions are sufficient to protect the local public interest in Lemhi River Basin fish conservation and recovery efforts. To the contrary, such a rationale would mean that IDWR has conclusively determined that the local public interest requires all future permit applications on Big Timber Creek to include or be subject to the requirement of a 13 CFS “bypass” flow at the highway 28 gage. The effect would be the same as establishing a 13 CFS minimum streamflow on Big Timber Creek with a priority date equal to that of water right 74-15613, and which defines how much water is available for future

irrigation. Indeed, this is exactly what Applicant expected would be the intent and effect of imposing the 13 CFS “bypass” condition in this case. HD1F2 at 29:30 – 31:35.

Establishing a *de facto* minimum streamflow in this way is prohibited by law. Idaho Code § 42-203A(5) provides that IDWR may not use the local public interest to establish a minimum streamflow, or to circumvent the minimum streamflow provisions of Chapter 15, Title 42, Idaho Code. Under these provisions, only the IWRB has the authority to determine and establish a minimum streamflow necessary for purposes of protecting fish and wildlife.

This means that, as a matter of law, IDWR may not consider the proceedings and orders regarding water right 74-15613 as requiring or supporting a determination in this case that the 13 CFS “bypass” conditions are sufficient to protect the local public interest in “maintaining” and “recovering” the ESA-listed fish species, and protecting fish habitat. *Summary Judgment Order* at 5. Rather, IDWR must rely upon the record developed in this case in determining whether the 13 CFS “bypass” conditions are sufficient to protect the local public interest values recognized in the *Summary Judgment Order*.

The uncontroverted evidence in this case establishes that the 13 CFS “bypass” conditions are not sufficient to “maintain” or “recover” the ESA-listed species in Big Timber Creek, or to protect fish habitat in Big Timber Creek and the Lemhi River. The uncontroverted evidence establishes that any additional reduction in the already-impaired instream flows of Big Timber Creek or the Lemhi River would have adverse effects on the listed fish species and their habitat, would undermine fish conservation and recovery efforts in the Lemhi River Basin, and would increase the risk of direct enforcement of the

ESA against local water users by NOAA Fisheries. The 13 CFS “bypass” flow conditions would not prevent or meaningfully mitigate for these significant negative impacts on the local public interest. *IDFG Post-Hearing Brief* at 21-25.

The Applicant offered no contrary evidence on these points, and also no affirmative evidence in support of the 13 CFS “bypass” conditions. Rather, the Applicant simply relied upon the fact that IDWR had previously imposed the 13 CFS “bypass” conditions on water right no. 74-15613. But as discussed above, Idaho Code § 42-203A(5) prohibits IDWR from using that rationale as a basis for requiring the 13 CFS “bypass” conditions on new applications.

g. The Local Public Interest in Fish Recovery and Conservation Efforts in the Lemhi River Basin Far Outweighs the Local Public Interest Considerations Asserted by the Applicant.

The Applicant presented some evidence that approving the Application would be in the local public interest. Specifically, the Applicant cited economic benefits to the local community, incidental recharge benefits, and the benefit of supporting historic and traditional ranching and community values in the Lemhi River Basin. Even if this evidence is credited, it is far outweighed by the local public interest in denying the Application.

i. The Economic Benefits of the Proposed Use to the Local Community are Minimal and Overshadowed by the Economic Drawbacks.

The Applicant testified that if the Application is approved, it will increase his income by allowing him to irrigate more pasture and increase cattle production. HD1F1 at 26:00 – 26:40; HD1F4 at 6:45 – 8:20, 14:20 – 16:50. The Applicant asserted that a significant portion of the investment required for the Applicant’s proposed project, and

the increased income would result from it, would be spent in the local community.

HD1F1 at 17:20 – 22:20. It is undisputed, however, that the permit would be a very junior right that in most years would be in priority for only a few weeks at most, and in some years not at all. HD 1F2 at 6:30 – 6:40, 11:05 – 11:15. The economic benefits to the local community would be similarly limited.

Moreover, the Applicant admitted that he currently rents pasture in many years, and the Application would allow him to discontinue paying for the rentals. HD1F1 at 26:00 – 26:40; HD1F4 at 6:45 – 8:20, 14:30 – 16:50. This means that approving the Application would also deprive the local community of the economic benefit of the rentals. *See Shokal v. Dunn*, 109 Idaho at 339, 707 P.2d at 450 (“if the Department gives weight to economic benefits of the project, it should also give consideration to the economic detriments.”) (quoting the District Court). In short, to a large degree approving the Application would not result in new economic benefits to the local community, but would simply re-distribute existing economic benefits.

Moreover, the asserted economic benefit of approving the Application pales in comparison to the potential economic harm that would be inflicted on the local community if NOAA Fisheries were to initiate enforcement actions in the Lemhi River Basin. This threat is “very real.” HD2F4 at 59:45 – 1:00:42; *see also* HD2F3 at 35:05 – 37:00 (discussing the NOAA Fisheries’ letter submitted in this case); Ex. 205 (NOAA Fisheries letter). “[T]he regulatory cloud is still there,” and NOAA Fisheries is “watching” this Application as well as the other pending applications to divert water from tributaries to the upper Lemhi River. HD2F3 at 35:06 – 37:00. Local water users

expressed concerns about the potential for direct enforcement actions by NOAA Fisheries. HD2F8 at 17:50 – 19:00, 1:10:45 -1:12:50; HD2F11 at 15:30 – 16:30.

Approving the Application could also have unintended adverse consequences for the Idaho Water Transaction Program. *See generally* HD2F7 at 34:30 – 40:50. The Idaho Water Transactions Program plays a critical role in fish conservation and recovery efforts in the Lemhi River Basin, and its continued operation is absolutely essential to protecting Lemhi River Basin water users from NOAA Fisheries enforcement actions. *See* HD2F7 at 39:15 – 40:50 (“The reason there is water there is because we are paying for it.”). This program is administered by IWRB and has invested or committed approximately \$5 million to fish conservation and recovery projects in the Lemhi River Basin. Ex. IDWR 12 at Attachment A; Ex. 219 at 8-9; Ex. 220 at 5-6. Most of these funds are provided by the Bonneville Power Administration (“BPA”), via the Columbia Basin Water Transactions Program (CBWTP”). HD2F7 at 6:30 – 7:00; Ex. 210 at 13-15. These entities also provide funding for water transactions to promote ESA-listed fish species recovery in other state, such as Washington, Oregon, and Montana. HD2F7 at 55:20 – 55:55.

CBWTP personnel were “quite surprised” to learn that Idaho is considering new irrigation water rights in a basin that is as flow-limited and critical to salmon recovery as the Lemhi River Basin. HD2F7 at 34:30 – 37:00. The whole purpose of the CBWTP is “to address diminished flows” in the Columbia River Basin. HD2F7 at 3:15 – 3:40, 6:30 – 7:00

For IDWR to issue new irrigation water rights that would diminish instream flows in the Lemhi River Basin, when IWRB has sought and received (and continues to

receive) substantial funding to address the lack of instream flows in the same basin, obviously raises questions about whether it makes sense to continue funding the Idaho Water Transaction Program. The manager of the Idaho Water Transaction Program, who meets with BPA and CBWTP personnel regularly and often, emphasized this point:

[Approving new water rights in the Lemhi River Basin] could undermine our relationship with them. I think it places doubt that we, we as the Qualified Local Entity have the commitment and the ability to enter into agreements with local water users and move the needle towards recovery, on one hand, and then issue new water rights on the other hand. So I think it puts our credibility in doubt to some extent.

HD2F7 at 34:30 – 37:00.

From the BPA's and CBWTP's standpoint, when they dealing with IWRB they are dealing with the State of Idaho, and the distinction between IDWR and IWRB is irrelevant. *Id.* There is a glaring inconsistency in the State of Idaho issuing new irrigation water rights in the Lemhi River Basin at the same time it is seeking funding from BPA and CBWTP to preserve and enhance existing instream flows. *Id.*¹⁸

In sum, the economic benefits to the local community of approving the Application are minimal at best. Further, approving the Application would undermine and put at risk the much greater economic benefits of voluntary fish conservation and recovery efforts in the Lemhi River Basin. The local economic benefits of denying the Application far outweigh any local economic benefits of approving the Application.

¹⁸ The purposes and local public interest values of the Idaho Water Transaction Program, and overall fish conservation and recovery efforts in the Lemhi River Basin, are not defined by or limited to maintaining the minimum flow at L-6. Maintaining the L-6 minimum flow is obviously important, but for reason discussed above, simply maintaining the instream flow of 35 CFS at L-6 is nowhere near sufficient to achieve recovery goals, or to provide local water users with long-term protection from the threat of regulatory enforcement by NOAA Fisheries.

ii. The Asserted Incidental Recharge Benefits of the Proposed Use Are Minimal or Non-Existent, and Are Not A Legally Cognizable Basis for Approving the Application.

The Applicant also asserted the Application is in the local public interest by analogizing his proposed use to traditional “high flow” use, and suggesting that approving the Application would provide substantial recharge benefits to other local water users. HD1F1 at 39:50 – 41:45; HD1F2 at 4:40 – 5:44; HD1F4 at 21:10 – 22:40, 31:20 – 33:00. These assertions do not support approval of the Application.

The only proposed use identified in the Application is irrigation, Ex. 183, and the Applicant acknowledged that any recharge benefit would be incidental to his proposed use of water for irrigation purposes. HD1F2 at 4:40 – 5:44; HD1F4 at 31:20 – 33:00. While the Idaho Legislature has declared that “incidental recharge” is “in the public interest,” Idaho Code § 42-234(5), in the same statute the Legislature also declared that “incidental recharge may not be used as the basis for claim of separate or expanded water right.” *Id.* By relying on the asserted incidental recharge benefits of his proposed sparkler project, the Applicant is using incidental recharge as part of the basis for the Application. This is contrary to Idaho Code § 42-234(5).

Further, the Applicant’s testimony establishes that his proposed sprinkler irrigation project is not analogous to traditional “high flow” practice, which relies on flood irrigation. HD1F4 at 1:06:15 – 1:08:20, 1:11:45 – 1:13:30; *see also* HD2F8 at 8:15 – 10:38 (Carl Ellsworth testimony distinguishing “high flow” flood irrigation from sprinkler irrigation). The Applicant also admitted that “high flow” flood irrigation is much more beneficial to the local water user community, in terms of recharge, than sprinklers such as those he plans to use. *Id.* The Applicant further admitted that he plans

to use sprinklers because this form of irrigation provides greater benefits to him than flood irrigation. *Id.* In short, the Applicant's own testimony rebuts any assertions that his proposed use has recharge benefits to other local water users. If anything, the Applicant's testimony establishes that converting his existing "high flow" use to sprinklers would result in decreased recharge benefits for the local water user community.

Other Lemhi River Basin water users confirmed that the incidental recharge benefits of center-pivot sprinkler systems are minimal or non-existent as compared to traditional "high flow" flood irrigation. HD2F8 at 8:15 – 10:38; HD2F11 at 15:00 – 18:30. One testified, for instance, that in his experience in the Lemhi River Basin the ground three feet beneath a pivot is "powder dry – there's no water there." HD2F9 at 10:00 – 11:10. The Applicant's assertions that his proposed sprinkler project is in the local public interest because of incidental recharge benefits lack credibility.

The Applicant did not offer any current or specific technical analysis supporting the asserted incidental recharge benefits of the Application. HD1F4 29:35 – 29:53, 31:20 – 33:40. The only technical evidence offered was 1976 geology and hydrology report prepared in connection with the Lemhi Adjudication. Ex. 12 ("Chapman Report"). This forty year-old report addressed surface or flood irrigation rather than sprinkler irrigation, *see id.* at 19-20 (referring to surface irrigation via "earthen ditches with little or no means of control" as being "the case in the majority of the Lemhi River Basin"), as the Applicant admitted. HD1F4 at 26:45 – 26:07; *see also* HD2F8 at 8:15 – 8:55 (Carl Ellsworth testimony). The Chapman Report did not address or analyze or quantify the incidental recharge benefits of sprinkler irrigation, did not analyze irrigation use or

recharge on the lands within the Application's proposed place of use, and obviously did not specifically analyze the Applicant's proposed sprinkler project. The Applicant's bare assertions that the Application would provide substantial incidental recharge benefits for the local water user community are unsupported and contrary to the evidence and testimony in the record.

iii. The Local Public Interest in Supporting Traditional Ranching And Community Values in the Lemhi River Basin is Best Served by Denying the Application.

The Applicant presented evidence that approving the Application would be in the local public interest because it would support historic and traditional ranching and community values in the Lemhi River Basin. Ex. 15; Testimony of James Whittaker. There is no dispute that these are important local public interest values. The IWRB agrees that it is in the local public interest to "preserv[e] and enhanc[e] the farming and ranching lifestyle and economy of the Lemhi River Basin." Ex. 219 at 42. Indeed, this is one of the most important purposes of conservation and recovery efforts in the Lemhi River Basin. *Id.* And respecting and protecting private property rights and the values of irrigated agriculture are core principles of the Idaho Water Transactions Program. Ex. 212 at 2; Ex. 219 at 5.

The disagreement in this case is simply whether approving the Application would advance these important local public interest values. And in this case the uncontroverted evidence establishes that approving the Application would undermine the local public interest in protecting, preserving, and enhancing the traditional ranching and agricultural lifestyle and values of the Lemhi River Basin. The reasons for this conclusion have been discussed at length above and need not be repeated here.

It suffices to say that in the Lemhi River Basin, protecting and enhancing the listed fish species and their habitat goes hand-in-hand with protecting existing water uses, traditional ranching and agricultural values, and the local community. *See, e.g.*, Ex. 219 at 3 (“Solution: Implement a voluntary program that compensates water right owners for changes in irrigation practices that protect the local economy while providing the flows required for recovery of ESA-listed species in accordance with Idaho water law.”). In short, the fact that approving the Application would undermine fish conservation and recovery efforts in the Lemhi River Basin necessarily means that approving the Application would also undermine efforts to protect and preserve the traditional ranching and agricultural benefits and values of the Lemhi River Basin.

CONCLUSION

In this case the Hearing Officer must balance and weigh the local public interest. Balancing and weighing the local public interest does not always equate to approving an application with conditions, however. Idaho Code § 42-203A(5) expressly contemplates and authorizes denial of an application when necessary to protect the local public interest.

This is such a case. The local public interest in the compelling, basin-specific circumstances and issues prevailing in the Lemhi River Basin require that the Application be denied. *See Shokal v. Dunn*, 109 Idaho at 340, 70 P.2d at 450 (“Nor will the [local public interest] elements have equal weight in every situation. The relevant elements and their relevant weights will vary with local needs, circumstances, and interests.”). In the Lemhi River Basin, the overriding local public interest values in denying the Application far outweigh any local public interest values there may be in approving the Application,

including approval with the 13 CFS “bypass” flow conditions. Denying the Application in its entirety is essential to protecting the local public interest in the Lemhi River Basin.

For the reasons discussed herein, and based on the evidence submitted at the hearing, the IWRB therefore respectfully requests that the Application be denied.

DATED this 27th day of September, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 27th day of September 2019, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

JAMES CEFALO IDAHO DEPARTMENT OF WATER RESOURCES 900 N. SKYLINE DR., STE A IDAHO FALLS, ID 83402-1718	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: 208-525-7177 <input checked="" type="checkbox"/> Email: james.cefalo@idwr.idaho.gov

2. Copies to the following:

IDAHO DEPARTMENT OF WATER RESOURCES ATTN: JEAN HERSLEY, TECHNICAL RECORDS SPECIALIST II 322 E. FRONT STREET, SUITE 648 BOISE, ID 83720-0098	<input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input checked="" type="checkbox"/> Statehouse Mail <input type="checkbox"/> Facsimile:
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